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No. 87-1651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

DOUGLAS L. OAKES,
Respondent.

On Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

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REPLY BRIEF FOR PETITIONER

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The parties to this case agree that the *Broadrick-Ferber* requirement of "substantial" overbreadth properly governs.[1] In addition, respondent does not contest that the challenged statute describes a central core of criminally regulable conduct. Disagreement in this case centers on whether the challenged statute is overbroad in a way which is both "substantial" and "real",[2] and whether re-

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[1] *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *New York v. Ferber*, 458 U.S. 747 (1982). *See* Brief for Respondent at 6.

[2] *New York State Club Association v. City of New York*, 108 S.Ct. 2225, 2234-35 (1988); *City Council v. Taxpayers For Vincent*, 466 U.S. 789, 800-01 (1984).

spondent's conduct in taking the photographs which form the basis of his conviction was protected under the First Amendment.

1. Forceful arguments are made by *amici* Massachusetts Society for the Prevention of Cruelty to Children *et al.*, and Covenant House/National Center for Missing and Exploited Children, that the conduct proscribed by the statute,[3] even where the poses do not portray sexual acts, is always sexually exploitive (and hence not protected under the First Amendment, *see New York v. Ferber*, 458 U.S. 747). The considered conclusions of these social service agencies, which deal with sexually exploited children on a daily basis, are entitled to great weight. At the very least, they put the lie to the essential premise of respondent and his supporters that sexual exploitation and taking pictures of nude children are two entirely different subjects. The plain fact, which cannot be emphasized enough, is that taking pictures of nude children *is* sexual exploitation in most cases.

Respondent and his *amici* (hereinafter collectively referred to as "respondents") have argued that section 29A is fatally overbroad on the grounds that it threatens to deter parents from photographing their naked children, nudists from advertising their chosen lifestyle, and artists from producing legitimate art. In making such claims, however, respondents plainly had some burden of demonstrating that the "chilling" scenarios they postulate are not merely hypothetical, but real. This they have failed to do.

Respondents have failed to identify any case in which section 29A has been used to prosecute a parent for taking a family photograph of a young naked child. Similarly, no prosecution has been uncovered involving family photographs taken of older children as part of a nudist family lifestyle. Finally, no endangerment of artistic freedom has been demonstrated in the Common-

[3] Mass. Gen. Laws ch. 272, § 29A ("section 29A").

wealth of Massachusetts during the history of section 29A and its predecessor.[4]

There has been no prosecution, or threat of prosecution, for the scenarios envisioned by respondents for the simple reason that prosecution in such circumstances would be inconsistent with appropriate implementation of a statute which is aimed at the sexual exploitation of children through portrayals of sexual conduct or through coerced or manipulated nudity. *See* Brief for Petitioner at 24-29. The explicit existence of an affirmative defense for bona fide scientific, medical, educational or cultural purposes, a defense which itself could be judicially interpreted to meet constitutional objections on a case-by-case basis, further undermines the respondents' claim that the hypotheticals they propose present a "substantial" and "real" threat to expression.

[4] The Appendix to *amicus* Law and Humanities Institute's ("LHI") Brief includes numerous films, photographs, and books that have been or are presently displayed in the Commonwealth or were produced or published here, and artists who apparently reside and create here. If anything, these examples demonstrate the absence, not the presence, of a chilling effect.

In addition, history does not support LHI's claim that the Commonwealth "departed radically" from the "legislative pattern established for child pornography laws by the United States Congress and the other states" when it enacted section 29A. (Brief of LHI at 27-28). This argument assumes that the Commonwealth enacted section 29A *after* Congress enacted federal child pornography legislation. In fact, however, the predecessor to section 29A, Mass. Gen. Laws ch. 149, § 104A, was enacted by Mass. Acts of 1977, c. 917, on January 3, 1978, *before* Congress enacted Pub. L. 95-225, § 2(a), 92 Stat. 7 (current version at 18 U.S.C. § 2251 (Supp. 1984)) on February 6, 1978. More importantly, the legislative history of the federal legislation reveals that Congress was concerned in 1978, prior to this Court's 1982 decision in *Ferber*, that the proposed bill might unconstitutionally prohibit the *sale* and *distribution*, *not* the *production*, of "non-obscene" material depicting children. S. Rep. No. 95-438, 95th Cong., 2d Sess. 1978, *reprinted* in 1978 U.S. Code Cong. & Admin. News 40, 49-50.

The likelihood of any future deterrence of protected expression is further diminished by the enactment of a successor statute which makes the legislative intent to criminalize only the sexual exploitation of children unmistakably clear. *See* Mass. Acts of 1988, c. 226 (striking section 29A and replacing it with a new section 29A entitled "Sexual Exploitation of Children"). The new statute requires proof of lascivious intent in its prohibition of child nudity. For this reason, the chilling effect alleged by respondents because of the original statute's hypothetical applicability to non-exploitive conduct is not a serious future consideration. *Cf. Pope v. Illinois*, 107 S.Ct. 1918, 1921 (1987) ("Facial invalidation of the repealed statute would not serve the purpose of preventing future prosecutions under a constitutionally defective standard.").

2. The suggestion (Brief of LHI at 23 n.2), that respondent's taking of the photographs for which he was convicted was well-intentioned, benign conduct falling within a protected zone of expression, is disingenuous at best. Defendant repeatedly testified under oath that he did not take the photographs. (Tr. 57-61). Moreover, the jury was specifically instructed that producing the photographs for an educational or cultural purpose for a bona fide school, museum or library, was a defense. (Tr. 104). Thus, the jury's verdict precludes any contention that the photographs were produced in order to further the victim's participation in modeling school.

On the clear facts of this case respondent was convicted and sentenced [5] for sexual exploitation, not for

[5] Respondent was sentenced to serve ten years at MCI Concord. An inmate sentenced to ten years at MCI Concord is eligible for parole after twelve months if he has no prior adult sentence, and after eighteen months otherwise. *See* Mass. Parole Board Policy 202 (1988). The Parole Board policies and regulations have the force of law. Mass. Gen. Laws ch. 27, § 5.

protected expression. *See* Brief for Petitioner at 31-33. As the trial judge put it:

> To suggest that a 15 year old girl can logically and intellectually submit herself for that kind of photography by her stepfather is to me—is to me an insult to anybody's intelligence. . . . [T]hey more than anybody else, are vulnerable to the exploitation of people like Douglas Oakes, and he was well aware of that, and he exploited that young woman. And I have no doubt that he'd exploit anybody else that he thought he could victimize in that context.

(Tr. 122).

Respectfully submitted,

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